

Exhibit B:

Excerpts of Oral Argument Transcript
from Ninth Circuit

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1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT

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5 ORACLE USA INC., a Colorado)
6 corporation; ORACLE AMERICA,)
7 INC., a Delaware corporation;)
8 ORACLE INTERNATIONAL) Nos. 16-16832
9 CORPORATION, a California) 16-16905
10 corporation,)
11 Plaintiffs-Appellees,)
12)
13 vs.)
14)
15 RIMINI STREET, INC., a)
16 Nevada corporation; SETH)
17 RAVIN, an individual,)
18)
19 Defendants-Appellants.)
20 -----)

21 TRANSCRIPTION OF ORAL ARGUMENT
22 JULY 13, 2017

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REPORTED BY: RENAE E. LOPEZ, CSR NO. 12142

FILE NO.: AB07AA8

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<p>1 APPEARANCES 2 BEFORE: 3 MICHELLE FRIEDLAND, 4 JUDGE ON THE NINTH CIRCUIT 5 SUSAN P. GRÄBER, 6 JUDGE ON THE NINTH CIRCUIT 7 JEREMY D. FOGEL, 8 JUDGE ON THE NORTHERN DISTRICT 9 OF CALIFORNIA 10 FOR PLAINTIFFS-APPELLEES: 11 KIRKLAND AND ELLIS, LLP 12 BY: PAUL D. CLEMENT, ESQ. 13 655 Fifteenth Street NW 14 Washington, DC 20005 15 (202) 879-5000 16 FOR DEFENDANTS-APPELLANTS: 17 GIBSON, DUNN & CRUTCHER, LLP 18 BY: MARK A. PERRY, ESQ. 19 555 Mission Street 20 Suite 3000 21 San Francisco, California 94105 22 (415) 393-8200 23 24 25</p> <p style="text-align: right;">Page 2</p>	<p>1 TRANSCRIPTION OF ORAL ARGUMENT 2 IN THE UNITED STATES COURT OF APPEALS 3 FOR THE NINTH CIRCUIT 4 JULY 13, 2017 5 - - - 6 7 MR. PERRY: Thank you, Your Honor, and may it 8 please the Court, Mark Perry for Rimini Street and 9 Mr. Ravin. I'll try to save two minutes for rebuttal. 10 From the constructions through the 11 instructions to the injunction, a single fundamental 12 error infected and pervaded the entire copyright case. 13 The district court ruled that third party maintenance 14 and support, and specifically the making of a testing 15 and development environment for updates and fixes, is 16 not within the licenses. 17 That one ruling made at summary judgment led 18 to summary judgment of infringement as to the 19 PeopleSoft and Database products, to directed verdicts 20 as to the Siebel and J.D. Edwards products, and to an 21 injunction that today prohibits Rimini Street from 22 conducting the conduct that is expressly authorized by 23 the licenses. 24 The court made this error at Page 100 to 102 25 first in the summary judgment record. That's where the</p> <p style="text-align: right;">Page 4</p>
<p>1 INDEX 2 3 Mr. Perry PAGE 4 Mr. Clement 4, 44 5 20 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 3</p>	<p>1 train jumped the tracks, Your Honors. The court ruled 2 that development and testing is not within the 3 licenses, even though it was undisputed then and 4 Oracle's witnesses admitted at trial that this complex 5 enterprise software requires updates, requires fixes, 6 and that a separate testing and development environment 7 is necessary to make those updates and fixes. 8 It may be important to understand why, Your 9 Honors. This is mission critical software. This is 10 running the payroll, the taxes, the supplier contracts, 11 and so forth for these enterprises, these companies. 12 If they need to make an update or a fix, they can't do 13 it on the application program. They have to have a 14 separate copy to run the update, to run the fix, to 15 test it out, to make sure it works, and then you apply 16 that to the application program. 17 The single fundamental error that 18 Judge Hicks made was in not recognizing that that 19 separate testing and development environment is a 20 licensed use, is a necessary use within the contract, 21 and that prohibiting that use, as the injunction does, 22 is not authorized by the Copyright Act. It has nothing 23 to do with the Copyright Act. It has -- is not 24 authorized by the licenses, and if upheld by this court 25 would constitute copyright misuse, as the Nimmer</p> <p style="text-align: right;">Page 5</p>

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<p>1 treatise makes clear, in so many words. 2 JUDGE FRIEDLAND: Say we agree with you on that 3 point. Don't you also need to win on the using that 4 environment to help another client point? I mean, it 5 seems like the court was resting on both points. 6 MR. PERRY: Your Honor, in the jury instructions, 7 the court rested on "or." It was either you can -- may 8 find liability if it was used -- not used only for 9 archival support, or was used for a third party 10 customer. So the jury -- the jury verdict would have 11 to be vacated even if that is. But our bigger 12 submission, Your Honor, is that the Copyright Act -- 13 this is a copyright case. The Copyright Act goes to 14 the copying, and the copying here was authorized, the 15 making of a separate environment. How that environment 16 was used, or as Oracle's secondary argument, where that 17 environment was housed, on which server it lived, those 18 are license disputes. Those are questions about the 19 application of a contract that ought to be under the 20 copyright laws, and this court's decision in MDY versus 21 Blizzard resolved as a matter contract law. 22 That's just a plain old commercial 23 dispute about the use of data, because once Oracle, as 24 they clearly have, has surrendered the exclusive right 25 to copy, all the remaining restrictions are not</p> <p style="text-align: right;">Page 6</p>	<p>1 though they're all identical, I have to -- I have to 2 instead look at the spine and pull down the support 3 manual that's labeled Client Number 2. I have to look 4 at Support Manual Number 2. That's all that's going on 5 here. 6 That may well be a license restriction, just 7 like the Federal Circuit said in the Storage Tech case, 8 you know, if I license you a book, and I say you can 9 read this book, but not the last ten pages, if you read 10 the last ten pages, you may have violated the license, 11 but you have not violated the Copyright Act. 12 Cross-use is a contract problem. Local 13 hosting is a contract problem. They are not copyright 14 problems. The only copyright issue in this case, we 15 submit, is the making of a development and testing 16 environment. We submit that the court got that plainly 17 wrong and it did it four times. 18 JUDGE FRIEDLAND: Isn't there the possibility, 19 though, that the -- the sharing with another can be the 20 problem even if you've made a copy? So you can copy 21 the music for your own sake, but when you start playing 22 it for a lot of other people, it starts to be a 23 problem. Maybe that -- that's, in theory, a kind of 24 copyright issue, isn't it? 25 MR. PERRY: Well, in your example, Your Honor,</p> <p style="text-align: right;">Page 8</p>
<p>1 copyright problems. They are contract problems. And 2 Oracle, in this case, brought contract claims. They 3 lost them or they withdrew them, but they had them, and 4 they could bring them in the future, but -- but this is 5 not a copyright dispute. 6 And -- and part of the -- the confusion, we 7 believe, starting in the summary judgment orders is in 8 the so-called cross-use and local hosting issues being 9 real issues. And, look, our company as it reflected in 10 the record, we have -- we have corrected those problems 11 now that Oracle has informed us that they are problems 12 from Oracle's perspective. We have taken steps to 13 redress them, and the second case, which is pending, 14 deals with whether those are acceptable under the 15 license, but they are not prohibited by the Copyright 16 Act. 17 Nothing in the Copyright Act has anything to 18 say about maintenance, other than to authorize it in 19 Section 117, about where -- which server data resides 20 on, about which customers use it for. And analogies to 21 the physical world are imperfect, Judge Friedland, but 22 imagine if I have ten clients, and I have ten copies of 23 an identical support manual from Oracle. This 24 cross-use argument is if I pull down one support 25 manual, and I don't look at which client it is, even</p> <p style="text-align: right;">Page 7</p>	<p>1 that's the public performance right, which is a 2 separate right under 106. In -- in this case, every 3 Rimini Street client has a license. No unlicensed 4 software was ever given to any customer or client 5 without a license. The only question was whether, as 6 -- as Mr. Ravin put it at trial, operational silos, that 7 is keeping everybody within the Data -- the PeopleSoft 8 tower, or the Database tower, or physical silos, that 9 is Client 1 versus Client 2 versus Client 3 was 10 required. That was a contract dispute we have had that 11 we believe has now been resolved. We'll see -- again, 12 that's the second case, but that is not a Copyright Act 13 problem. 14 The -- the -- and -- and even if -- by the 15 way, let's spot Oracle this one, that would be a new 16 trial. We -- a new trial would still be required. It 17 wouldn't -- that wouldn't be a judgment. That would 18 just be a new trial, because all of the liability 19 determinations, both at summary judgment and in the 20 verdict, rest not only on the so-called cross-use, but 21 also on the prohibition that Judge Hicks found on 22 creating development and testing environments. 23 And this development and testing 24 environments is the most critical piece in the case. 25 It is something we have raised over and over again. We</p> <p style="text-align: right;">Page 9</p>

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<p>1 put it front and center in our brief, and Oracle -- it 2 doesn't appear in Oracle's brief. All that Oracle says 3 in their brief in this court is well, these licenses 4 only are -- authorize archival copies, and that's just 5 not true. The licenses do authorize archival copies, 6 as they have to, by the way, the -- the Copyright 7 Statute 35, USD Section 117 actually makes clear that 8 archival copies aren't even an act of infringement, so 9 that -- you know, that part of the license is not 10 necessary.</p> <p>11 Then they also authorize each and every one 12 of the four licenses at issue, also authorized third 13 party support providers to assist the customer in their 14 use of the software. What Judge Hicks said is that use 15 is, quote, related to internal business operations or 16 internal data processing operations, and that that 17 doesn't include copying for testing and updates.</p> <p>18 Your Honor, that's just not the case. The 19 trial record, Oracle's own witnesses, Page 924, Page 20 1046 and 1047, Page 1064 to 65 of the Excerpts of 21 Record all admitted that that kind of copying, that 22 kind of testing and development is permitted under 23 these licenses, and that makes sense if you look at the 24 licenses themselves. Just give you one example from 25 the Siebel license, Page ER1163.</p> <p style="text-align: right;">Page 10</p>	<p>1 the activities that it undertakes.</p> <p>2 And what Judge Hicks did at summary 3 judgment, and then again in the jury verdict is said -- 4 for the Siebel contract in the jury verdict, at Page 5 548 of the Excerpts of Record, he said these provisions 6 authorize only archival copies and do not authorize the 7 making of development and testing copies. That is just 8 plain legal error. He misread the contract, and -- and 9 correcting that error requires, we submit, a judgment for 10 Rimini, and Oracle hasn't disputed this.</p> <p>11 Oracle has never disputed either at the Rule 12 50 stage or in this court, that if you reverse that 13 license construction, it's not just a new trial, it's a 14 judgment issue, because all the other issues in the 15 case, Judge -- Judge Friedland, this goes to your 16 question, are about contract application and licensing, 17 which ought to be resolved. There is a second case 18 pending, as the court is aware, involving the current 19 processes. That can all get sorted out on commercial 20 terms.</p> <p>21 This whole thing -- by the way, this is a 22 commercial dispute. Oracle doesn't want competition in 23 this space. That is no secret. It has sued every 24 third party service provider we believe ever to have 25 entered the market. It usually has been successful,</p> <p style="text-align: right;">Page 12</p>
<p>1 JUDGE GRABER: Just a second. Thank you. Okay. 2 I'm with you.</p> <p>3 MR. PERRY: Section 2.3 of the Siebel license, 4 "The customer should have the right to make suggestions 5 regarding new features, functionality or performance 6 and to create its own implementations of such 7 suggestions or to have them created for the customer." 8 In other words, the customer can hire a third party to 9 develop new features, functionality, or performance.</p> <p>10 JUDGE GRABER: Where do you see third party in 11 that, though?</p> <p>12 MR. PERRY: Your Honor, it's at the very last 13 sentence, "to have them created for the customer." And 14 the third parties are more specifically referred to in 15 2.1 Romanette VIII, "to have third parties, such as 16 system integrators install, integrate, and otherwise 17 implement the software."</p> <p>18 So the third parties are expressly 19 authorized under this contract, as under all others, 20 and not just for archival purposes, as -- as Oracle 21 would have it, and as Judge Hicks agreed, but for 22 implementation, integration, installation, new 23 features, new functionality, and new performance. 24 That's what Rimini Street's business is. This -- these 25 provisions describe my client and expressly authorize</p> <p style="text-align: right;">Page 11</p>	<p>1 and it has usually driven them out of the market. 2 That's its prerogative, so long as it stays within the 3 law, but these licenses were not written by Oracle. 4 These licenses were written by companies that Oracle 5 acquired. These licenses authorized third party 6 support.</p> <p>7 My client is doing its best to comply with 8 these licenses and offer a service to customers as an 9 alternative for competition.</p> <p>10 JUDGE FRIEDLAND: So I think your -- your client 11 is still doing okay at this point, but -- so I'm 12 wondering how that affects your copyright misuse 13 argument. So you say you're complying with this order, 14 but if this order is right, it's copyright misuse to 15 interpret it this way, but it seems like you are 16 surviving as a business.</p> <p>17 MR. PERRY: There's two answers to that. First, 18 we -- we have changed the processes to address the 19 cross-use and local hosting aspects, which we agree are 20 contractual issues. We think the court got those wrong 21 too, for reasons I'm happy to explain, but it is, you 22 know, more -- it makes it more expensive for my client, 23 to no benefit to Rimini Street. To go back to my 24 example, if I have ten identical support manuals, to 25 make me look at Number 2 to support Client Number 2,</p> <p style="text-align: right;">Page 13</p>

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<p>1 instead of just pick one of the ten identical manuals, 2 I can do that. It adds a step to the process, and 3 every step is an expense, and it's no difference from 4 Oracle's perspective, because I still have ten 5 identical support manuals, but -- but we can do that, 6 and same with the local hosting. There are some 7 transmission delays and so forth, but whether the 8 material is stored on Rimini's servers, or on the 9 client's servers, or on other servers -- by the way, 10 cloud servers, the client has control over, we submit 11 are within the client's -- that those are within the 12 site restrictions. 13 JUDGE GRABER: Which -- which portion of the 14 instructions specifically are you contending is -- are 15 infected by this issue? 16 MR. PERRY: Your Honor, it's on ER547 and ER548. 17 It's instruction -- it is the instruction entitled 18 "Copyright Infringement Express License," which is 19 Instruction Number 24. 20 JUDGE GRABER: Right, I'm there. 21 MR. PERRY: On 547 is the J.D. Edwards 22 instruction. It's Lines 6 through 10, "This 23 provision," that is, the license provision, "does not 24 mean that a third party, like Rimini Street, is 25 authorized to make copies of the J.D. Edwards software</p> <p style="text-align: right;">Page 14</p>	<p>1 with the identified licensees. I think that's the 2 total import of the instruction, isn't it? 3 MR. PERRY: Well, there are -- the cross-use 4 aspect is in there. It is in there, Judge Fogel, as an 5 "or" on Line 9 on Page 547. It's either you make a 6 development and testing copy, or you use it to support 7 somebody else. The jury can find liability on both. 8 We submit that the first is a clear error of copyright 9 law, and the second is a license dispute that ought to 10 be resolved, as such, and, by the way, is not without 11 the license is simply because the licence is -- 12 JUDGE FOGEL: Does it -- does it say you can't 13 make any development and testing copies at all? I 14 thought it said you -- you can't make any copies for 15 these prohibited purposes. 16 MR. PERRY: Your Honor, it says the provision 17 does not mean that Rimini Street is authorized to make, 18 to carry out development and testing of software 19 updates. I mean, that's the plain language of the 20 instruction. Same thing in the summary judgment. 21 JUDGE GRABER: Well, inter -- it's unfortunately 22 not very precise grammatically. I just -- 23 MR. PERRY: Your -- 24 JUDGE GRABER: -- say that it's possible to read 25 the "supporting other customers" as modifying</p> <p style="text-align: right;">Page 16</p>
<p>1 application and documentation to, among other things," 2 dot, dot, dot, "carry out development and testing of 3 software updates." That is the eh--a and on 548, the 4 same sentence exists for Siebel, and just to close the 5 loop on it, the summary judgment stage is at Page 102 6 for PeopleSoft and Page 71 for Database under the 7 customer license, exact same sentence, exact same 8 error. And, Judge Friedland, to answer your question, 9 that's the part that creates the business problem, and 10 that would be copyright misuse. If that construction 11 is sustained, that is, that -- if a third party cannot 12 create development and testing environments, then 13 Oracle has effectively precluded third party 14 maintenance and support. 15 JUDGE FOGEL: Well, I'm sorry, if I might 16 interrupt. There's more to the instruction than that. 17 I mean, it says you can't create those environments for 18 certain purposes. You -- you can do it for archival 19 purposes, and you can do it to support the customers 20 that -- that your client supported, but it says you 21 can't do it to use the -- to make modifications of the 22 software, use the customer's software or support 23 materials to support other customers. So it's -- it's 24 using the software for purposes outside the scope of 25 the -- the business that your client was engaged in</p> <p style="text-align: right;">Page 15</p>	<p>1 everything that comes before in the sentence, and it's 2 possible to read it the way you do. 3 MR. PERRY: Yes, Your Honor, I -- I agree with 4 you -- 5 JUDGE GRABER: But you -- 6 MR. PERRY: -- because -- 7 JUDGE GRABER: But it is possible to read it the 8 way Judge Fogel was just suggesting, that all of this 9 can't be done to help someone else. 10 MR. PERRY: Well, that is because Oracle insisted 11 on making this case about cross-use, and kept trying to 12 elide this point about the development and testing 13 environments. So let me -- let me make a very simple 14 way to under -- to think about this, that I -- simple 15 for me, anyway. If the customer makes a development 16 and testing environment, is the customer within the 17 license? We submit absolutely yes. The customer, 18 however, would fit within the jury instruction, the 19 injunction, which I haven't touched on yet, but the 20 injunction which prohibits, by the way -- I mean, if 21 you look at the injunction as -- 22 JUDGE GRABER: Well, this -- this -- this 23 instruction is purely about third party use. It's not 24 about the customer. 25 MR. PERRY: But our --</p> <p style="text-align: right;">Page 17</p>

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<p>1 JUDGE GRABER: It doesn't say that. 2 MR. PERRY: But -- but third parties have the 3 same rights as the customers. 4 JUDGE GRABER: Well, that's a separate question, 5 but -- but it -- 6 MR. PERRY: Well, no, it's not a separate 7 question. 8 JUDGE GRABER: Well, it is, because you said the 9 jury instruction would apply to the customer, but 10 it's -- it starts by saying this doesn't mean what a 11 third party can do, so it's all about third parties. 12 MR. PERRY: Fair enough, Your Honor. Our 13 submission is that there are no special restrictions on 14 third parties. Oracle has tried to find some in its 15 brief here. They are evanescent. They are 16 nonexistent, because each of the licenses -- I'll just 17 point this out, PeopleSoft, Section 14.2, at Page 18 ER1180, "The licensee may provide access to and use of 19 the software to third parties that provide services." 20 J.D. Edwards, ER1172, Article II, Section 7, "Customer 21 may cause anyone to copy the software, to the extent 22 necessary to support the users." Siebel, ER1163, 23 Section 2.1, Romanette VIII, "To have third parties 24 install, integrate, and implement the software." 25 Database customer arrangement, ER1183. "You may" --</p> <p style="text-align: right;">Page 18</p>	<p>1 copyrighted book or from watching a copyrighted movie. 2 The courts don't have that power, Your Honor, but 3 Judge Hicks has ordered us not to access Oracle's 4 source code. That's a First Amendment violation, in 5 addition to a Copyright Act violation. 6 And then the injunction also says that 7 Rimini Street can't use anyone's software for the 8 benefit of another, so to take my manual example, if I 9 take down the manual, and I learn for Client A, and I'm 10 using Client A's manual, that to update the tax 11 software, I have to set the switch to three this year, 12 and then I go to Client B, apparently, I can't just go 13 in and set the switch to B, because I'm using something 14 that I learned from that manual for the benefit of 15 another client. So it's -- it's -- it's prohibiting 16 the mental processes of engineers and -- and -- and 17 innovators. 18 JUDGE GRABER: Did you wish to save some rebuttal 19 time? 20 MR. PERRY: I would. Thank you very much, Your 21 Honor. 22 JUDGE GRABER: Thank you. 23 MR. CLEMENT: Good morning, Your Honors, and may 24 it please the court, Paul Clement for Oracle. 25 Rimini engaged in massive unauthorized</p> <p style="text-align: right;">Page 20</p>
<p>1 the rights granted, "You may allow your agents and 2 contractors to use the programs for this purpose," and 3 the purpose is for business operation. 4 Each of these contains an express 5 authorization for third parties to help the customer 6 use the software, and the undisputed evidence at trial, 7 the evidence from Oracle's witnesses was to -- using 8 the software requires updates, fixes, maintenance, and 9 support, and the only way to provide update, fixes, 10 maintenance, and support is to create a development and 11 testing environment so that this whole thing comes 12 together. 13 And as to the injunction, briefly, you know, 14 it carries through these same license constructions 15 that were in the summary judgment order and in the 16 instructions, and prohibits, for example, J.D. Edwards 17 and Siebel, third parties shall not use the software 18 for any purpose other than archiving. That's not what 19 the licenses say. The injunction goes so far beyond 20 the license. They say, for JDE and Siebel, that the 21 Rimini Street cannot access the source code. 22 Your Honor, access is not a right under 23 Section 106. 106 applies to reproduction, 24 distribution, and derivative works, as relevant here. 25 Access -- you can't prohibit somebody from reading a</p> <p style="text-align: right;">Page 19</p>	<p>1 copying of Oracle's copyrighted works. That copying 2 was not limited to application programs, but extended 3 to copyrighted materials made exclusively available to 4 customers who paid Oracle extra to support and update 5 Oracle's software in their application programs. The 6 copying was conceded, as was distribution, to a degree, 7 was conceded, as was, belatedly, the unauthorized 8 cross-use by Rimini of copyrighted works downloaded for 9 one client and then copied and used to service a 10 different client. 11 Now, Mr. Perry makes some very interesting 12 arguments today, but they were not the arguments that 13 were contemporaneously made in the district court. He 14 suggests that the root error here was that -- the 15 judge's summary judgment ruling. Now, he talks about, 16 in the context of the Siebel case, some provisions of 17 the Siebel license that aren't even discussed in that 18 summary judgment order. 19 If you look at the Excerpts of Records, Page 20 112 and 113, you'll see the entirety of the discussion 21 of the Siebel license in the context of the license 22 that Siebel had with Novell. Now, you won't see the 23 kind of provisions that he's talking about, and there's 24 a reason for that. 25 I mean, you know, litigation, especially a</p> <p style="text-align: right;">Page 21</p>

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<p>1 litigation where one party to the litigation makes 2 repeated misrepresentations to the court, it has an 3 evolution of its own, and you can't just go into the 4 appellate court and sort of get a complete do-over. 5 Now, at the point the summary judgment order is being 6 litigated, and I think this is important to recognize, 7 Rimini Street is denying cross-use. They're saying 8 they don't do it, they never do it. That's their 9 position at that time.</p> <p>10 By the time you get to trial, they're saying 11 cross-use happens all the time. So at this point, the 12 only reason -- and you'll see this if you read these 13 two pages -- the only reason that they avoid summary 14 judgment, based on the aspects of the license that they 15 actually bring to the judge's attention 16 contemporaneously is because they actually say that 17 they can show that the only copies on their system were 18 there for archival and back-up purposes.</p> <p>19 Now, that turns out to be another lie, and 20 by the time trial happens, they can't even sustain that 21 that's what they're going to do with the trial.</p> <p>22 JUDGE GRABER: Well, do -- I'm a little unclear 23 on what it is you're trying to tell us. Are you 24 telling us that the issue that has been argued here was 25 waived, or are you telling us that it's wrong? Because</p> <p style="text-align: right;">Page 22</p>	<p>1 principal affirmative defense was express license. 2 JUDGE GRABER: Right. 3 MR. CLEMENT: It was expressly licensed. The 4 burden's on them to point to provisions in the -- in 5 the licenses that authorize their conduct. 6 JUDGE GRABER: Okay. He's done that today. 7 MR. CLEMENT: Well, if -- if I can say, first, he 8 has to do that at the right time in the litigation. 9 JUDGE GRABER: I understand. 10 MR. CLEMENT: And he hasn't done that. Secondly, 11 even the provisions that he points to today do not 12 remotely map onto the copying and distribution that 13 they conceded below. And so I'm happy to talk about 14 specific romanettes if we'd like, but nothing in any of 15 these licenses remotely authorized them to have 16 thousands and thousands of copies on their own servers 17 and to engage in copying and distribution for the 18 copyrighted work of one client and use it on another 19 client.</p> <p>20 And these are not just contract disputes. I 21 mean, again, that's another argument that they didn't 22 properly preserve. 23 JUDGE FRIEDLAND: Though your opposing counsel 24 argued, though, that the -- that the injunction and -- 25 and the copyright ruling prohibits them from using</p> <p style="text-align: right;">Page 24</p>
<p>1 those are two quite very different things, and -- and 2 Opposing Counsel has pointed to text in the licensing 3 agreements that, in his view, suggests that third 4 parties do have a right, beyond archiving, to -- to 5 make use of -- of these materials, and so I'm trying to 6 pinpoint which thing you're saying.</p> <p>7 MR. CLEMENT: I'm ultimately saying both, Your 8 Honor. I guess what I'm saying, though, is principally 9 on appeal, I think we have to litigate this on the 10 basis of the case that was actually litigated before 11 the judge, and if Mr. Perry wants to come up here and 12 say that the root cause of all the problems in this 13 case are the summary judgment order, he can't make 14 arguments based on little romanettes and licenses that 15 weren't part of the summary judgment argument.</p> <p>16 JUDGE GRABER: Why is he wrong if we look at the 17 licensing agreements?</p> <p>18 MR. CLEMENT: He's wrong if you look at the 19 licensing agreements -- if I can just back up one step. 20 The way that this case was litigated, and the way I 21 think it's properly litigated in this court is the 22 first question is did Rimini Street engage in copying 23 and distribution, and of course they did, and that's 24 conceded. So then the burden shifts to them to provide 25 an affirmative defense, and they had a couple, but the</p> <p style="text-align: right;">Page 23</p>	<p>1 the -- from making -- even -- even the licensee from 2 making a copy for a testing environment. Do you -- and 3 then by proxy, their client from helping the -- the 4 licensee from doing that. Do you dispute that it 5 prevents them from doing that?</p> <p>6 MR. CLEMENT: I -- I certainly would say that 7 they can't make a testing environment on their own 8 servers. Now, you know, whether -- whether they can go 9 in, consistent with the terms of the lease, and not 10 engaging in any cross-use, and not doing it on their 11 own servers, whether they can go in and -- and assist a 12 licensed user in creating a testing environment on that 13 licensed user's servers and use it to make a fix, I 14 think that they probably can do that, with the caveat 15 that it might depend on the specific terms of the 16 specific license.</p> <p>17 And to the extent there are disputes about 18 that, I mean, Mr. Perry and his law firm are involved 19 in Rimini 2 at a stage that they weren't involved in 20 Rimini 1, and those issues can be resolved. And to the 21 extent that they say that there's something very 22 specific that they can't do under the license, that 23 they say they need to do in order to provide this 24 service, I suppose we could then have a copyright 25 misuse affirmative defense that was focused on that</p> <p style="text-align: right;">Page 25</p>

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<p>1 delta --</p> <p>2 JUDGE GRABER: Could I --</p> <p>3 MR. CLEMENT: -- but --</p> <p>4 JUDGE GRABER: Could I ask you about that, then?</p> <p>5 So, for example, I'm looking at ER1163, which was the</p> <p>6 page we were going over, which is the Siebel license</p> <p>7 where it says that they have the right to have third</p> <p>8 parties, EG, system integrators, install, integrate and</p> <p>9 otherwise implement the programs and ancillary</p> <p>10 programs, and have suggested fixes created. You're</p> <p>11 saying that can happen only on the servers of Siebel,</p> <p>12 and not on the servers of the third party? Is that</p> <p>13 your argument as to what that means?</p> <p>14 MR. CLEMENT: That is the gist of it, Your Honor.</p> <p>15 JUDGE GRABER: Okay.</p> <p>16 MR. CLEMENT: I think what we would say is that</p> <p>17 all of these provisions in the license, you know, that</p> <p>18 provision can't be read in isolation. It has to be</p> <p>19 read in conjunction with the other license terms, and</p> <p>20 the other license terms make clear two things; one,</p> <p>21 that it takes -- it should take place on the licensee's</p> <p>22 servers, on their -- on their facilities, and secondly,</p> <p>23 that it really needs to be done in the way that at the</p> <p>24 time of the litigation that the summary judgment went</p> <p>25 down, they were saying that they were doing it, which</p> <p style="text-align: right;">Page 26</p>	<p>1 oh, well, we're going to engage in -- I'm going to give</p> <p>2 you this software, but I'm really worried, because it's</p> <p>3 software, and my whole business is licensing, so I'm</p> <p>4 really worried that this is going to get out, and all</p> <p>5 of a sudden, a hundred users are going to use this</p> <p>6 instead of just one, so I am going to significantly</p> <p>7 limit and put a condition on the copying and</p> <p>8 distribution you can do of this. If the user then goes</p> <p>9 and engages in massive copying, that is not just a</p> <p>10 contract dispute, that is a clear violation of the</p> <p>11 copyright laws, and it is something where their only</p> <p>12 defense can be express license, and they have to point</p> <p>13 to the specific provisions of the license that</p> <p>14 authorized their conduct.</p> <p>15 And this is, I think, important is that it's</p> <p>16 not just enough for them to now talk about, look, we</p> <p>17 have a little dispute about the licenses, about whether</p> <p>18 it would authorize the way we now want to provide</p> <p>19 service, or the way we hypothetically might have</p> <p>20 provided service. Their burden is to show that they</p> <p>21 had an express license to engage in the conduct they</p> <p>22 actually engaged in, and that issue --</p> <p>23 JUDGE FRIEDLAND: Is it your position that they</p> <p>24 ever used one client's software to help another client,</p> <p>25 who didn't have their own license?</p> <p style="text-align: right;">Page 28</p>
<p>1 is they said at that time, we don't engage in -- in</p> <p>2 cross-use. We have a siloed approach to every one of</p> <p>3 our users, and we never engage in this -- this kind of</p> <p>4 cross-use.</p> <p>5 That cross-use is important, in terms of the</p> <p>6 conditions in the license. It's not just a contract</p> <p>7 dispute. You know, there's a difference in this</p> <p>8 court's cases between a condition and covenant, and it</p> <p>9 is just not the law that if my client wants to license</p> <p>10 somebody to engage in copying and distribution, to a</p> <p>11 very limited extent, that once we do that, somebody</p> <p>12 else, even a third party to it, can come in, engage in</p> <p>13 massive copying and distribution and Katy, bar the</p> <p>14 door, all we have is a contract claim. That is not the</p> <p>15 law, and he only refers to half of the illustration in</p> <p>16 the Court's case.</p> <p>17 Sure, if I tell somebody here's a copy of</p> <p>18 Shakespeare or copyrighted work -- I guess it should be</p> <p>19 something more contemporaneous.</p> <p>20 JUDGE GRABER: I would think so.</p> <p>21 MR. CLEMENT: Yeah, so -- so -- so a Garshin</p> <p>22 novel or whatever, if I say here it is, it's yours, you</p> <p>23 can -- you know, you can even make a copy, but, by the</p> <p>24 way, don't read the last ten pages, that is just a</p> <p>25 covenant that's contractually enforced. But if I say,</p> <p style="text-align: right;">Page 27</p>	<p>1 MR. CLEMENT: Well, it is our position that they</p> <p>2 routinely used one client's copyrighted software to</p> <p>3 provide service to another and engage in copying and</p> <p>4 distribution that is not authorized by either license.</p> <p>5 JUDGE GRABER: That doesn't answer the question</p> <p>6 that was asked.</p> <p>7 JUDGE FRIEDLAND: If both --</p> <p>8 JUDGE GRABER: Would you --</p> <p>9 JUDGE FRIEDLAND: -- people -- did both parties</p> <p>10 in the -- in that exchange of both clients have</p> <p>11 licenses with Oracle?</p> <p>12 MR. CLEMENT: In -- in many of the cases, yes.</p> <p>13 Not exclusively. I mean, there are arguments before</p> <p>14 the jury, and I'm not sure, because of the way the case</p> <p>15 was litigated, anything particularly turned on this,</p> <p>16 but there were arguments that they were providing</p> <p>17 service for PeopleSoft holders before they had a single</p> <p>18 client.</p> <p>19 The issue, with respect to Database, is</p> <p>20 actually separate, and there, they just flatly violated</p> <p>21 the terms of their own developer license, and there's</p> <p>22 no third party. So when you look at the case, and you</p> <p>23 look at the 93 counts of copyright infringement where</p> <p>24 the jury found copyright infringement for 93 works, you</p> <p>25 break it down. It is simply not the case as to -- that</p> <p style="text-align: right;">Page 29</p>

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<p>1 to all 93 of those, everybody was covered by some 2 license. 3 JUDGE GRABER: Would that matter? 4 MR. CLEMENT: No, as -- as my, perhaps not 5 entirely responsive answer to the first question 6 indicates, our position is it doesn't matter at all, 7 maybe because you simply -- they engaged in massive 8 copying -- 9 JUDGE GRABER: Why wouldn't it matter? Because 10 if they had the right to make ten copies for each of 11 ten clients, one for each, and they, in fact, made ten, 12 but they did it in one -- in one place and spread it 13 out over the ten, why -- why does that make any 14 difference in the real world? Why do any damages flow 15 from that? 16 MR. CLEMENT: It makes a difference in the real 17 world, I think, if you understand the licensing model 18 for software, because when you're licensing the use of 19 software, and you're not selling them the software, 20 you're licensing it, it is critical that your licensor 21 only uses it on their servers and their systems. 22 JUDGE GRABER: I don't understand why. I 23 understand -- you -- you keep saying that, but if -- 24 but to use my hypothetical, if all ten people have paid 25 for one copy, if all paid, and they all have a license,</p> <p style="text-align: right;">Page 30</p>	<p>1 service business or anything. 2 MR. CLEMENT: It -- if that had happened -- I 3 mean, it's an interesting question whether we would 4 have brought a copyright action under those 5 circumstances, but we would have one. 6 JUDGE FRIEDLAND: I -- 7 MR. CLEMENT: I mean, look, if I just try to be 8 responsive to that, I mean, if we have a license, and 9 it licenses somebody to make just one copy for archival 10 and back-up purposes, and they make a thousand, that's 11 a copyright violation. Now, if they keep the thousand, 12 and they never do anything -- 13 JUDGE GRABER: There are no damages. 14 MR. CLEMENT: There's no damages. What's that? 15 JUDGE GRABER: Then there'd be no damages. It's 16 just -- 17 MR. CLEMENT: Well, there'd be statutory damages. 18 JUDGE GRABER: Right. 19 MR. CLEMENT: I mean -- 20 JUDGE GRABER: Yeah. 21 MR. CLEMENT: -- there might not be loss of 22 profit damages -- 23 JUDGE GRABER: Right. 24 MR. CLEMENT: -- but there would be statutory 25 damages, and if they did it a way that was</p> <p style="text-align: right;">Page 32</p>
<p>1 and instead of making ten copies that are put into the 2 correct slots, they make ten copies in Slot Number 3, 3 and then give them to the same ten people, I don't 4 understand why that makes any difference. 5 MR. CLEMENT: It makes a difference, Your Honor, 6 because if you don't honor the terms of the license, 7 and you don't keep essentially the license, and you 8 just mix them all together, what you end up is not with 9 ten copies on one person where it's consistent with a 10 licensing term. You end up with exactly what you had 11 in this case, which is the software library that they 12 destroyed that had thousands and thousands of Oracle's 13 copyrighted works on it, and in a way that wasn't even 14 sorted from one client to another. So they couldn't 15 even tell you that they -- even thought they were 16 contemporaneously claiming that we do this client by 17 client -- 18 JUDGE FRIEDLAND: But if they had downloaded a 19 whole bunch of things and put them on a server and 20 never touched them, your -- never used them to help any 21 client, never did anything with them, would -- it's 22 your position that would be a big problem? 23 MR. CLEMENT: It would -- 24 JUDGE FRIEDLAND: Not sure what damages would 25 flow from that. You wouldn't have lost any customer</p> <p style="text-align: right;">Page 31</p>	<p>1 disrespectful for the copyrights and the like, you 2 might, in that case -- I mean, you know, maybe in that 3 case, you get statutory damages of 200. 4 JUDGE GRABER: Before you run -- 5 MR. CLEMENT: In this case -- 6 JUDGE GRABER: Before you run out of time, 7 though, I -- I want to shift the focus, if I may, with 8 my colleagues' permission, to the statutory claims. 9 JUDGE FOGEL: May I? 10 JUDGE GRABER: Yes. 11 JUDGE FOGEL: Before you do that, can I just ask 12 one question? 13 JUDGE GRABER: Please. 14 JUDGE FOGEL: Counsel made a point about the -- 15 the jury instructions, and some potential ambiguity in 16 the jury instructions. Can you -- can you address 17 that? 18 MR. CLEMENT: Sure. Well, first of all is -- you 19 know, I think it would be helpful to ask him on 20 rebuttal exactly where they preserved their objection 21 and exactly what their objection was contemporaneously, 22 because I -- the way this case is litigated, I hadn't 23 thought that they were objecting to that jury 24 instruction in that way. 25 I -- my contemporaneous understanding is</p> <p style="text-align: right;">Page 33</p>

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<p>1 they didn't even object to it in these terms. My 2 answer to it would be, though, if you actually look 3 at -- I think this is Excerpts of Record, Page 547. 4 JUDGE FOGEL: Right. 5 MR. CLEMENT: If you look at this, all of this, 6 as I read it, is something about -- you know, this is 7 not something that says, broadly speaking, you can 8 never have a development testing environment, because 9 that's not really the way the case was being litigated, 10 and the specific prohibition, as I see it, is whether 11 you can access the software source code to carry out 12 development, testing of software updates. Now, the 13 licenses are very clear that you can't access the -- 14 the source code, and that's not uncommon, and I don't 15 think it's a First Amendment problem, and certainly no 16 First Amendment issue was adjudicated contemporaneously 17 or until about 20 minutes ago, but the licenses do not 18 allow access to source code. As I say, that's a common 19 provision in licenses -- 20 JUDGE FOGEL: So -- 21 MR. CLEMENT: -- because -- 22 JUDGE FOGEL: So the syntax is not perfect, but 23 if you look at it in context, it's -- and particularly 24 if there's no objection, you don't see it as being an 25 issue?</p> <p style="text-align: right;">Page 34</p>	<p>1 that a statutory violation at all, because it -- the 2 example I used in my own head was I say to you, you are 3 welcome to download this information, but please don't 4 do it on the weekends, 'cause I don't want to have to 5 have employees at my end on the weekends, and you do it 6 on Saturday afternoon. I -- I'm not accessing the 7 information without permission. I'm accessing it in a 8 manner that is contractually disallowed, and so I don't 9 understand why that isn't merely a contractual 10 violation and not a violation of the statute. 11 MR. CLEMENT: I think it's a violation, Your 12 Honor, because what the statutes require, and this is 13 from this court's Christensen decision, is you have to 14 knowingly access without permission. Now, they did not 15 have access, they did not have permission to access, 16 using the scrapers that they used in the manner that 17 they used them. 18 JUDGE GRABER: But that's the -- the -- that's -- 19 you're getting into my exact problem, which is the 20 manner, because Christensen -- in Christensen, they had 21 no permission to have the data, period, so they, 22 without permission, took, copied, and made use of the 23 data. And here, there was permission to take the data, 24 make use of the data, but what they did wrong was how 25 they did it, and so I guess I just have difficulty</p> <p style="text-align: right;">Page 36</p>
<p>1 MR. CLEMENT: I don't see it being an issue at 2 all. And, again, I think what -- what they need is a 3 contemporaneously raised objection that also maps onto 4 the conduct they actually engaged in, and gives them a 5 colorable argument that the conduct they actually 6 engaged in was expressly licensed by these licenses. 7 JUDGE GRABER: Okay. 8 MR. CLEMENT: And if you think about it that way, 9 it's really not a particularly close question because 10 of what they did. 11 JUDGE GRABER: Question about the statutory 12 claims. I wanted to get your position on this, because 13 it appeared to me that the defendants had permission to 14 obtain the data, but what they did wrong was to use 15 things that I don't even understand, bots and scrapers. 16 Is that a correct understanding of what happened, that 17 if -- if an individual had laboriously downloaded each 18 thing one time, it had been downloaded, that would have 19 been okay, but using the bots and scrapers caused a lot 20 of problems, and that was not okay? Is that -- is that 21 a correct understanding of what that claim is really 22 about? 23 MR. CLEMENT: I think that is a correct 24 understanding of what the claim is about. 25 JUDGE GRABER: Okay. So if that's true, why is</p> <p style="text-align: right;">Page 35</p>	<p>1 seeing how that fits with the text of the statute with 2 Christensen and with our Nosal and Facebook cases that, 3 on the federal side, distinguish between violations of 4 terms of use and -- and wrongful acquisition of 5 information. 6 MR. CLEMENT: Your Honor, I think it fits 7 comfortably within the terms of the statutes. I'm 8 not -- for one thing, again, I'm not sure that the 9 exact argument you're making right now was 10 contemporaneously preserved, but -- and so that's one 11 answer, but the other answer is I do think it fits 12 within both the statute and within the terms of what 13 this court said in Christensen, and I think it's 14 important to recognize that one of the things that's 15 different about the statutes here, and one of the 16 things that I think makes them completely satisfied is 17 what really is a sine qua non of the violation is the 18 taking or use without permission, and -- 19 JUDGE GRABER: But they had permission to take 20 it. 21 MR. CLEMENT: Not in this manner, Your Honor. 22 JUDGE GRABER: But that's -- 23 MR. CLEMENT: Not -- 24 JUDGE GRABER: That's the -- 25 MR. CLEMENT: -- in this manner.</p> <p style="text-align: right;">Page 37</p>

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<p>1 JUDGE GRABER: But --</p> <p>2 MR. CLEMENT: And --</p> <p>3 JUDGE GRABER: Christensen is about taking</p> <p>4 something you have no right to take at all. That --</p> <p>5 those were the facts, and that was the decision, and</p> <p>6 that's what the text of the statute seems to say,</p> <p>7 because what you're saying is, in my example, if I say</p> <p>8 you are absolutely welcome to have this information,</p> <p>9 please don't do it on Saturday. You do it on Saturday,</p> <p>10 you've committed a crime in -- in California. That --</p> <p>11 I don't think that's what the legislature had in mind,</p> <p>12 I guess --</p> <p>13 MR. CLEMENT: Well, I --</p> <p>14 JUDGE GRABER: -- and I have difficulty with</p> <p>15 saying that the manner equates to a statutory</p> <p>16 violation.</p> <p>17 MR. CLEMENT: Well, Your Honor, with respect, I'm</p> <p>18 not sure why there's anything in the word without</p> <p>19 permission that forecloses somebody from providing a</p> <p>20 permission that has essentially a manner restriction on</p> <p>21 it, and I think when you think about -- whatever might</p> <p>22 be true of some other hypotheticals -- I mean, when you</p> <p>23 think about here where the manner restriction is</p> <p>24 critical to protecting the integrity of the computer</p> <p>25 systems --</p> <p style="text-align: right;">Page 38</p>	<p>1 And so the argument that they made, which I</p> <p>2 think the jury accepted, was, look, we couldn't have</p> <p>3 knowingly violated the terms of the licenses, because</p> <p>4 we didn't have contemporaneous access to them. It's a</p> <p>5 completely different situation when it comes to the</p> <p>6 terms of use. There, they have -- there's all sorts of</p> <p>7 contemporaneous evidence, and a cease and desist letter</p> <p>8 to boot, that shows that they knew that they couldn't</p> <p>9 take them essentially wholesale and -- because if you</p> <p>10 take it wholesale, I mean, obviously two things are</p> <p>11 going on.</p> <p>12 The reason they're doing this is because</p> <p>13 they have some customer who's moving from Oracle to</p> <p>14 Rimini, and as a practical matter, they have like</p> <p>15 six -- six days left on their contract that gives them</p> <p>16 access to this site, and they don't have enough time to</p> <p>17 load them down one by one, so they just rip everything</p> <p>18 off the site, with the prospect of our -- my client's</p> <p>19 servers essentially getting shut down. That's why it's</p> <p>20 in there in the terms of use, and I don't see</p> <p>21 anything --</p> <p>22 JUDGE GRABER: Well, that's particularly --</p> <p>23 MR. CLEMENT: To answer your question, I don't</p> <p>24 see anything in -- without permission that says --</p> <p>25 JUDGE GRABER: Well, without permission what?</p> <p style="text-align: right;">Page 40</p>
<p>1 JUDGE GRABER: Well, that's --</p> <p>2 MR. CLEMENT: -- it gets to the heart.</p> <p>3 JUDGE GRABER: Except that the -- that there</p> <p>4 are -- there are ways to get to that, which would be,</p> <p>5 you know, contractual, or contracts, or torts, or</p> <p>6 whatever, but remember, this is basically a criminal</p> <p>7 statute that carries with it civil liabilities,</p> <p>8 so how --</p> <p>9 MR. CLEMENT: Sure, and with respect, that's why</p> <p>10 the jury was instructed in this particular case.</p> <p>11 Essentially, they -- they were told to find -- not find</p> <p>12 liability unless they found subjective understanding</p> <p>13 that what Rimini Street was doing was forbidden by the</p> <p>14 terms of use.</p> <p>15 And so the jury -- and this is one way in</p> <p>16 which this is, I think, critically different from the</p> <p>17 issue with respect to the copyright, because I find,</p> <p>18 given all the conduct in this case, the most puzzling</p> <p>19 aspect of this case is the innocent infringement</p> <p>20 finding. But I think it makes a little more sense when</p> <p>21 you understand, and you can look at their closing</p> <p>22 arguments and see this, their principle argument below</p> <p>23 for why the infringement was innocent is because they</p> <p>24 didn't have contemporaneous access to the license</p> <p>25 terms, because the license terms were confidential.</p> <p style="text-align: right;">Page 39</p>	<p>1 Without permission takes information, and that's not</p> <p>2 what happened here. They had permission to take the</p> <p>3 information, but only in a certain way.</p> <p>4 MR. CLEMENT: They did not have the -- they did</p> <p>5 not have permission to take data in the way that they</p> <p>6 took data.</p> <p>7 JUDGE GRABER: I understand your argument, and</p> <p>8 you've exceeded your time.</p> <p>9 JUDGE FRIEDLAND: Can I ask one more question?</p> <p>10 JUDGE GRABER: Yes.</p> <p>11 JUDGE FOGEL: And I have one question too as</p> <p>12 well.</p> <p>13 JUDGE FRIEDLAND: Yeah.</p> <p>14 JUDGE FOGEL: But please go ahead.</p> <p>15 JUDGE FRIEDLAND: So if we were to agree with you</p> <p>16 on the liability determinations of the damages, can you</p> <p>17 speak to why the injunction is necessary? It seems</p> <p>18 like they've brought a whole lawsuit to try to figure</p> <p>19 out if they're complying with the liability</p> <p>20 determinations, so I don't really understand why there</p> <p>21 also needs to be an injunction, when it seems like</p> <p>22 they're trying to comply.</p> <p>23 MR. CLEMENT: Well, I think there needs to be an</p> <p>24 injunction principally because of the history of this</p> <p>25 lawsuit and the history of Oracle's ability to rely on</p> <p style="text-align: right;">Page 41</p>

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<p>1 representation that Rimini Street makes to Oracle or to 2 courts. I mean, if you understand that this is a 3 company that said that they had no software library, 4 they didn't have one at all, then when it came out that 5 they had one, and they said, well, you know, okay, it 6 was there, but, you know, they denied that they 7 destroyed it. They destroyed it. 8 JUDGE FRIEDLAND: So say -- 9 MR. CLEMENT: Then you get to the -- 10 JUDGE FRIEDLAND: So say they violate again in 11 your view, they -- they do something that you think is 12 another copyright violation. Is there a practical 13 difference at that point between going to the court and 14 saying, look, we have this judgment that said they 15 can't do this, and now they're doing it again, versus 16 we have this injunction that also says they can't do 17 it, and now they're doing it again? 18 MR. CLEMENT: Sure, and I mean one practical 19 difference is the ability to hold them in contempt, and 20 the ability to hold somebody who is repeatedly engaged 21 in contumacious conduct in contempt, I think, is no 22 small thing, and I think ultimately, the question is 23 it an abuse of discretion? And I think Judge Hicks was 24 very well positioned to understand that this was no 25 ordinary infringer, and this is somebody who I would</p> <p style="text-align: right;">Page 42</p>	<p>1 mean, you know, again, I think there, the issue's 2 pretty straightforward, because you have a willful 3 finding, and I think the statutory injunction, which is 4 the only injunction that's directed to him personally, 5 is amply justified, especially because he was also 6 find -- found personally liable. 7 JUDGE FOGEL: In terms of protection that your 8 client gets, does the statutory injunction add anything 9 other than naming Mr. Ravin personally? 10 MR. CLEMENT: It -- it does, because I think 11 the -- the conduct that is enjoined by the statutory 12 injunction is different from the conduct that's 13 enjoined by the copyright injunction, and it's 14 oversimplifying matters, but it roughly corresponds to 15 sort of the access to the website issues, which are 16 principally covered by the statutory injunction, and 17 the sort of avoiding unauthorized copying, which is 18 principally covered by the copyright issue. 19 JUDGE FOGEL: Thank you. 20 JUDGE GRABER: Thank you, Counsel. We'll hear 21 from Mr. Perry. 22 MR. PERRY: Four quick points, if I may. On the 23 injunction, what Oracle really likes -- and they say 24 lots of nasty things about my clients, by the way. The 25 jury rejected all of that, all the tort claims, all the</p> <p style="text-align: right;">Page 44</p>
<p>1 say, in my humble opinion, richly deserves to be 2 subject to an ongoing injunction enforced by the 3 contempt power of a court. 4 JUDGE FOGEL: Just a related question. The 5 statutory injunction -- two injunctions. So the 6 statutory injunction is the only way you get Mr. Ravin 7 personally, but -- but under the copyright injunction, 8 he's bound by -- by the terms of the injunction. Given 9 the innocent infringement finding -- I think you may 10 have addressed this question in part already, but given 11 the innocent infringement finding, did -- did 12 Judge Hicks apply the proper equities in issuing the 13 statutory injunction? 14 MR. CLEMENT: In -- yes, but I think with respect 15 to the statutory injunction, it's -- and I think I did 16 sort of get to this, as to the -- as to the state law 17 claims, there's a finding of willful misconduct. 18 JUDGE FOGEL: On the terms of use? 19 MR. CLEMENT: Yes. 20 JUDGE FOGEL: Yeah, not -- not copyright, but 21 terms of use. 22 MR. CLEMENT: Right, and I thought that's what 23 you were asking me. 24 JUDGE FOGEL: Yeah. 25 MR. CLEMENT: And so the statutory claims, I</p> <p style="text-align: right;">Page 43</p>	<p>1 punitive damages, all the willfulness. They found us 2 innocent, and they found us innocent because our 3 reading of the license was reasonable and correct. But 4 in the injunction, what Oracle really likes is 5 Paragraph 2-A, which says that every one of our 6 customers has to affirm in writing that Rimini's 7 specific conduct is authorized by the licenses. 8 So they want to hold the sort of contempt 9 over their own customers and our customers, and they 10 want to drive them back from Rimini into the Oracle 11 fold, by requiring them to affirm, in writing, what 12 these contracts mean, which we're here in the Ninth 13 Circuit arguing what they mean, and that is not 14 something for the customers. And that's not in the 15 Copyright Act, that's not in the licenses. This is 16 just in terrorem, and this injunction is totally 17 unnecessary. 18 Judge Friedland, in answer to your question, 19 Mr. Clement said, in so many words, although it took a 20 long sentence, that developing and testing environments 21 may be authorized. May be authorized. We'll take 22 that. That means a new trial, at minimum, and we think 23 it means judgment, but it means a new trial, because 24 again, at ER102, ER71, ER547, and ER548, Judge Hicks 25 ruled that testing and development --</p> <p style="text-align: right;">Page 45</p>

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<p>1 JUDGE GRABER: What is your response to his 2 argument that at the time of summary judgment and at 3 the time of the crafting of the jury instructions, this 4 was not the specific argument that was made? 5 MR. PERRY: Your Honor, it was -- it was exactly 6 the argument made for PeopleSoft and Database, and 7 that's specifically addressed at Page 102 and 71. At 8 summary judgement -- 9 JUDGE FRIEDLAND: Sorry, could you say the page 10 again? 11 MR. PERRY: I'm sorry, ER100 to 102 for the 12 PeopleSoft argument, Page ER71 for the Database 13 customer license. For the Siebel and J.D. Edwards 14 arguments, Mr. Clement is correct, in the sense that 15 the summary judgment argument turned on the factual 16 record as to archival use; however the later -- the 17 other provisions that I've talked about were very much 18 injected later in the case. 19 I'll point the court, among other places, to 20 ER142 to 162, which is our detailed objection of the 21 injunctions, which pulled together in one place all of 22 the license constructions. The injunction, of course, 23 carries through the license constructions from summary 24 judgement to the instructions to judgement. 25 As to the jury instructions themselves,</p> <p style="text-align: right;">Page 46</p>	<p>1 MR. PERRY: We objected to the application of the 2 summary judgment constructions in the -- to instructing 3 the jury on the summary judgment constructions, because 4 we maintained our -- our ongoing objection. 5 JUDGE FOGEL: But -- but following up, the -- you 6 pointed out the potential -- and I'm sorry I keep 7 saying this, the syntactical problem in the way they 8 leads -- the language and some of the instructions 9 track. Was there ever any objection to that? Was the 10 trial court ever given an opportunity to address that? 11 MR. PERRY: Yes, yes, Your Honor. That -- there 12 is a -- thank you. There is a separate document, which 13 is -- if my old eyes can read this thing, which they 14 probably can't. My colleague will tell me the 15 citation. We -- Rimini Street submitted an alternative 16 set of instructions that rewrote that one included to 17 have a different grammatical structure. It still 18 incorporated the summary judgment language, because we 19 had lost the objection at Rule 52, carrying forward 20 summary judgment language, but the syntactical, I 21 believe, was corrected there. In general, the court 22 adopted Oracle's instructions, Docket Number 869, Your 23 Honor, at 32 to 36, I'm told. 24 The last thing I'd like to offer, and 25 I'll -- and I'll sit down, is no client ever got any</p> <p style="text-align: right;">Page 48</p>
<p>1 Judge Graber, we objected, and Docket Number 620 is our 2 redacted version of our objection to application of the 3 summary judgment standards. In the jury instructions, 4 we had also moved, of course, Rule 50(a), on the ground 5 that the -- 6 JUDGE GRABER: Specifically, did you -- did you 7 quarrel with the inclusion of the material about making 8 the -- 9 MR. PERRY: We -- we objected to the -- 10 JUDGE GRABER: -- extra copy for -- 11 MR. PERRY: We objected to the application of the 12 summary judgment standards in total, which is the same 13 as our Rule 50(a) motion, which is -- 14 JUDGE GRABER: That's not my question. I'm not 15 being clear. Your objection earlier, when you were 16 talking about the jury instructions, had to do with the 17 part that said the provision does not mean that a third 18 party, just paraphrasing here, has the authorization to 19 access the source code to carry out development and 20 testing. 21 MR. PERRY: Yes. 22 JUDGE GRABER: Did you object to that specific 23 sentence in the jury instructions? 24 MR. PERRY: Not in so many words, Your Honor. 25 JUDGE GRABER: Okay.</p> <p style="text-align: right;">Page 47</p>	<p>1 software for which it wasn't licensed. We had a whole 2 trial. Oracle could have showed that. Mr. Clement 3 didn't give you any evidence. They have theories, but 4 they have no evidence. 5 Every single one of Rimini's clients is an 6 Oracle customer that has paid millions and millions of 7 dollars for this software. The only dispute here is 8 whether they need to be physically siloed and on which 9 server they reside. If you've got an authorized copy 10 of a book, it's like saying you have to read it in your 11 library and not in your den, or you have to read it in 12 your house, but not at your office, or you have to look 13 at it in this order and not in that order. Again, 14 those are restrictions. 15 JUDGE GRABER: Well, why isn't it -- why isn't it 16 more like saying, you know, you have -- you have the 17 authority to have the book, but I'm withholding 18 authority for you to have the movie? Why isn't it more 19 like that? 20 MR. PERRY: Well, that specific point, Your 21 Honor, they have authorized the creation of modified 22 works in each of these agreements, so -- so they've 23 already granted that right, but the -- the use -- the 24 location restrictions are not something the Copyright 25 Act is concerned with, how -- where a work is stored,</p> <p style="text-align: right;">Page 49</p>

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<p>1 because the -- the fixation of the work is not 2 protected. It is the work itself; okay? 3 The code is the code. Wherever it resides, 4 that's what the copyright is in, and as long as the 5 code that the user has a license to the code, then 6 which copy it is -- and, by the way, Judge Hicks 7 actually understood this point and got it in rejecting 8 Oracle's argument regarding the installation media, 9 which is earlier in the first summary judgment order 10 when -- when Oracle said you had to use the specific 11 physical disc to feed them in the computer, and he said 12 no. Judge Hicks said no, the code is the code, and the 13 copyright resides in the code. 14 And so the important thing for our purposes 15 is every single service, every single practice, every 16 update, fix, modification was provided for a customer 17 with a license. There is no unlicensed -- 18 JUDGE FRIEDLAND: But he's saying that there was 19 this huge downloading of an entire library. Are you 20 saying every bit of that library was used for someone, 21 or was there this extra file storage in case you needed 22 it? 23 MR. PERRY: There may well have been extras, Your 24 Honor, because these are gigantic programs. And if I 25 can just give you an example, you know, the PeopleSoft</p> <p style="text-align: right;">Page 50</p>	<p>1 but it looks forward and says we may be going to 2 Michigan. So it goes to Rimini Street and says 3 download that for me and hold it for me so that if I go 4 to Michigan, I can have it. That's what is -- is 5 happening here, and that's what the clients are 6 entitled to. That's what they paid for. 7 Every bit of data was bought and paid for. 8 Every bit, byte was bought and paid for. It was taken 9 down. It was held by Rimini Street for use by Oracle's 10 customers. Remember, our clients are Oracle's 11 customers, and every bit of use here was authorized by 12 these licenses. This whole case needs to be resolved 13 in that manner. 14 JUDGE GRABER: Thank you, Counsel. The case just 15 argued is submitted, and we appreciate very much the 16 stimulating and interesting arguments from both 17 counsel. 18 (End of recording.) 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 52</p>
<p>1 tax program is going to have all 50 states. If I've 2 got a customer, who is a deli in California, they may 3 only need the California tax regime, but if they get 4 the whole PeopleSoft package, it's going to have 5 thousands and thousands of files, as Mr. Clement says, 6 and it's going to include Michigan, and Wisconsin, and 7 California, and New York, and Illinois, and they might 8 not need these other 49 states, but next year, when 9 they expand into Nevada, or the year after that, when 10 they expand into Arizona, they will need those. And 11 they paid for those, and they're entitled to those, and 12 then they can use those, or if they have an employee 13 that moves out of state, and under ERISA or something, 14 they have an obligation to keep up the tax reporting, 15 so there -- yes, there may be unused data -- 16 JUDGE FRIEDLAND: But had Rimini downloaded all 17 these things, like in anticipation for hoping to some 18 day get a client in Michigan? 19 MR. PERRY: No, Your Honor, I -- and, again, it's 20 another mischaracterization. Here's a simple way to 21 understand it: The deli in California, its -- its -- 22 its annual contract with Oracle is going to expire on 23 December 31st. That client's entitled to a whole bunch 24 of things, for example, the Michigan tax data that it 25 hasn't yet downloaded, because it's only in California,</p> <p style="text-align: right;">Page 51</p>	<p>1 TRANSCRIBER'S CERTIFICATE 2 3 I, RENAE E. LOPEZ, attest that the foregoing 4 proceedings provided to me via audio were transcribed 5 by me to the best of my ability. 6 I further attest that I am not a relative or 7 employee to any attorney or party, nor financially 8 interested in this action. 9 I declare under penalty of perjury under the laws 10 of the State of California that the foregoing is true 11 and correct. 12 Dated this ____ day of _____, 2017. 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">_____ Renae E. Lopez</p> <p style="text-align: right;">Page 53</p>

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